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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 263.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

against

CLARENCE BEZUE,

Respondent.

Respondent's Supplemental Brief Filed by Special Permission of the Court.

THOMAS J. O'NEILL,
Counsel for Respondent.

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CHARLES D. LEWIS,
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CHARLES WATSON RUSSELL, Printer

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Respondent's Supplemental Brief Filed by Special Permission of the Court.

When this cause was argued on January 7th last, the Chief Justice informed counsel that the *Collins* and *Szary* cases had been overruled by the Court's decision in *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission of Illinois and Joe Thomas*, filed on Monday, January 4th. After the argument counsel received from the clerk a copy of the said opinion, and thereafter respondent's counsel requested the Court, through the Chief Justice, for permission to file this supplemental brief, which was granted.

We will endeavor to confine this brief to an effort to show that the overruling of the *Collins* case, 253 U. S. 77, and the *Szary* case, 253 U. S. 86, does not require or justify the reversal of this judgment.

We wish at once to impress upon the Court that the facts with reference to respondent's work are not correctly stated in the majority opinion of the New York

Court of Appeals, in the first paragraph of page 490 of this Record. The actual facts are as follows:

Respondent was in petitioner's employ for about a year before he was injured (R., 105, 129), the first eight months as an engine wiper (R., 130), and the last four months exclusively working on locomotives, ninety to ninety-five per cent. of which were locomotives exclusively engaged in interstate transportation (R., 130, 217, 264; Plaintiff's Exhibits 15a, b and c, R., 366, 446). The testimony of the witness Jenkins explains the aforesaid exhibits (R., 210, 211, 212, 217, 227, 228, 229, 230, 231). Respondent worked on and in connection with these interstate locomotives, using a portable truck with crane attached (R., 130) solely in and about the roundhouse. Every day he worked on many of these interstate locomotives going from one to another (R., 106-111), and aiding with his truck and by hand in making all kinds of innumerable adjustments on interstate engines in the roundhouse for boiler washes and repairs and adjustments, which were always made incidental to boiler washes (R., 108-111 and 119). Very frequently heavier maintenance repairs were made on these locomotives during boiler washes than the work that was being done on this locomotive at the time of respondent's injury (R., 265). *The respondent was not assigned to any yard work or general work in the maintenance of the roundhouse itself. He never did any window cleaning or anything of that kind, and the reference to such work in the majority opinion of the New York Court of Appeals is not with reference to the particular work of the respondent, but to the general work of the unskilled labor gang* (R., 261), and respondent for four months before he was injured was not in such general gang, but was paid an increased wage and classified as a truck operator, operating a truck which he used every day in working on and in connection with all of

these interstate locomotives in and about this roundhouse (R., 130). *There were only two men in this roundhouse who did this kind of work* (R., 149), so this case does not include within the scope of the Federal Act all this unskilled labor gang, but merely calls for respondent's inclusion in the same class as passed upon by this Court in *New York Central R. R. Co.* v. *Marcone,* 281 U. S. 345.

A boiler wash is never made alone but always in conjunction with temporary and minor repairs (R., 188-189), and the movement of the wheels at the time of the accident was incidental to this boiler wash. The record shows as follows:

> "*By the Court:*
>
> Q. The boiler wash period was substantially monthly? A. Yes, sir.
>
> Q. And at the time in question the moving of these wheels was a part of the monthly repairs which was incident to the boiler wash period? A. Yes, sir" (R. 264).

The petitioner maintains in Readville, Mass., a back-shop for complete out-of-service overhauling. This type or group of locomotives, when such complete overhauling is needed, is deadheaded from Maybrook to Readville and put out of service.

The record, and particularly the exhibits, show that this type of locomotive is never put out of service while undergoing boiler washes or repairs at the Maybrook terminal, and the exhibits do not indicate that any of the petitioner's employees or foremen ever marked or recorded them as being out of service while at the Maybrook terminal, and the record shows affirmatively that if at any time a locomotive was found which needed these heavy back-shop repairs then the locomotive was marked "For shop," and sent to Readville

(R., 213, 264, 406, 412, 414). We take it that in deciding this case the Court will decide what constitutes a locomotive being out of service as based upon this evidence and the practice of the petitioner itself.

So the fact in this case is that it can not possibly be said that these interstate locomotives of this type undergoing boiler washes and repairs incident thereto were ever considered by the railroad company as out of service until they were sent to Readville, and the Respondent's Exhibits 14a, b and c (R., 362-365) show the much heavier repairs that were made at this backshop in Readville as distinguished from the repairs incidental to the boiler washes which were made at the Maybrook terminal.

It may be accurate to say that all of these locomotives while in the roundhouse were not in use, but they certainly were not out of service. They are also not in use when in the roundhouse merely for the purpose of inspection or greasing and oiling and incidental repairs between runs, but they are not out of service, and a man oiling and greasing such locomotives is within the Federal Employer's Liability Act. (See *Marcone* case, *supra*).

The facts in this case are quite similar to the facts in *Oglesby* v. *St. L. & S. F. R. R. Co.*, 318 Mo. 79; 277 U. S. 587, which is referred to at length at pages 20-21 of respondent's main brief, and we request the Court to examine this decision.

The case of *Erie R. R. Co.* v. *Collins*, 253 U. S. 77, recently overruled by this Court in *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission*, decided January 4, 1932, is readily distinguishable from the case at bar.

The great distinction between the *Collins* case and the one at bar, is that, although Collins was generally

engaged in interstate transportation, he had at the time of his injury left the scene of his interstate duties and was doing work entirely unrelated and different from such interstate duties.

It was never claimed that the *Szary* case was applicable to the case at bar.

The case of *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission, etc., supra,* of course has no relation to the case at bar except insofar as it overrules the *Collins* and *Szary* cases.

The Thomas case is in the same group, wherein we find *Shanks* v. *D. L. & W. R. R. Co.*, 239 U. S. 556; *Chicago & N. W. R. R.* v. *Bolle*, 76 L. Ed. 90, decided November 23, 1931; *Chicago, B. & Q. R. R. Co.* v. *Harrington*, 241 U. S. 177.

The case at bar comes within the *Marcone* and the *Oglesby* cases, *supra,* and is alike in principle to the case of *Erie R. R. Co.* v. *Winfield,* 244 U. S. 170. In the *Winfield* case, Winfield was in charge of a switch engine and was killed while leaving the yards after his day's work. It was not even shown that his last movement of the engine was in the switching of interstate cars, but it was held that his status was that of an interstate transportation employee because, although he was leaving the yards after his day's work, he had been all day using his locomotive switching both interstate and intrastate cars.

In the case at bar Bezue was engaged exclusively in the repair and keeping in condition locomotives as previously pointed out. His status, therefore, in principle, was the same as the status of Winfield. Winfield was switching cars sometimes interstate and sometimes intrastate. Bezue was assisting in minor repairs and keeping the locomotives in running and serviceable condition and nothing else. His work took him from locomotive to locomotive. He had not been engaged upon the locomo-

tive in question until about two hours before the accident *and even during this time not continuously* (R., 136-137). The engine was in the roundhouse for a boiler wash and incidental repairs. The fact that the driving wheels were removed to clean the bushings did not withdraw the locomotive from its status as an instrumentality of interstate transportation any more than if one bolt had been removed. As heretofore stated, the statement contained in the opinion of the Court of Appeals that Bezue did other work around the roundhouse, such as washing windows, is erroneous. Bezue himself testified that his sole work for the last three or four months before his injury was upon locomotives, and no one contradicted him. The expression in the Court's opinion was inadvertent and arose by reason of the testimony of one of the defendant's witnesses who generally described the duties of the laborers in the unskilled labor gang, *but Bezue for three months was no longer in that class,* and if he ever performed such work when first employed,—and there is no evidence to that effect, his testimony merely being that he first was an engine wiper—he had long since done nothing except to keep locomotives in repair and running condition.

It is therefore submitted that the status of Bezue was that of interstate transportation employment; and, further, that, irrespective of his general status, the locomotive that he was working in connection with was engaged exclusively in interstate transportation and had not been withdrawn from service at all—any more than all the other locomotives which came into the roundhouse daily.

Respondent's counsel also submits that the case at bar comes within the case of *New York Central R. R. Co.* v. *Marcone,* 281 U. S. 345. Marcone was working in a roundhouse upon locomotives the same as the respondent in the case at bar. He had worked upon

many locomotives on the night in question. The last one upon which he worked, No. 3835, was an interstate locomotive but it is submitted first, that the character of the last locomotive is not the controlling factor any more than the last switching movement in the *Winfield* case, *supra,* was the controlling factor and hence, under the *Marcone* case and *Winfield* case, the respondent was engaged in interstate transportation. In fact the language of this Court's opinion in the *Marcone* case can be directly applied to the case at bar:

> "*His presence on the premises* was so closely associated with his employment in interstate commerce as to be an incident of it as to entitle him to the benefit of the Employer's Liability Act" (Italics ours).

The Judgment Should Be Affirmed.

Respectfully submitted,

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